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U. S. DEPARTMENT OF JUSTICE
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Docket No. 96-6
CARP NCBRA

ASCAP'S REPLY TO BROADCAST MUSIC INC.'S
RESPONSE TO ASCAP'S MOTION TO STRIKE
CERTAIN PORTIONS OF THEIR DIRECT CASE

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Before The
LIBRARY OF CONGRESS
United States Copyright Office
Copyright Arbitration Royalty Panel
Washington, D.C. 20024

In the Matter Of

ADJUSTMENT OF THE RATES FOR
NONCOMMERCIAL EDUCATIONAL
BROADCASTING COMPULSORY LICENSE

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} CARP NCBRA
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The American Society of Composers, Authors and Publishers ("ASCAP")
makes the following reply to the Response (the "Response") of Broadcast Music, Inc.
("BMI") to ASCAP's Motion to Strike Certain Portions of BMI's Direct Case (the
"Motion").

In the Motion, ASCAP challenged two assumptions embodied in the written
testimony of Bruce M. Owen and Fredric Willms: (i) that there is a reasonable correlation
between a public radio station's format and its music use and (ii) that BMI's share of music
played on public radio is the same as that on commercial radio. BMI has failed to offer any
rational basis for either of these assumptions.¹

¹ For example, at page 5 of the Response, BMI offers the following non-sequitur: "with
respect to the remaining 31 percent of music hours broadcast on public radio, BMI's share of
this programming is equal to its music share on commercial radio. This assumption is based
upon Mr. Willms's testimony that the commercial radio industry places roughly the same
value on BMI's repertoire as ASCAP's as shown by similar blanket license rates, as well as

(continued...)

Instead, BMI has asked that the CARP accept its testimony-by-assumption merely because it is "relevant and material." As support, BMI maintains that the assumptions "directly support[] BMI's proposed fee for public radio stations." This self-serving justification can hardly be a sound basis for accepting expert testimony. In that regard, we would note that, over the last license period, public radio stations earned over \$2.1 billion in revenues. BMI is asking this CARP to find that the performance of its music substantially contributed to the generation of those revenues. If this CARP is to so find, it must base that decision on something more than Mr. Willms's unsupported assumption that BMI's share of music on public radio "is equal" to its share of commercial radio. Mere relevancy cannot be the sole basis for allowance of testimony which clearly lacks any foundation or evidentiary support in the record. Accordingly, ASCAP requests that Mr. Willms's assumptions regarding music use on public radio be stricken as well as the testimony of Mr. Owen which is based upon those assumptions.

(...continued)

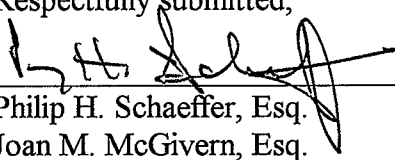
Mr. Willms's knowledge and experience." (Response at 5). No mention is made as to what evidence BMI is using to support its claimed share of public radio broadcasts.

Conclusion

For the foregoing reasons, ASCAP respectfully requests that its Motion to Strike Certain Portions of the Direct Case of Broadcast Music, Inc. be granted.

Dated: December 3, 1997

Respectfully submitted,



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CERTIFICATE OF SERVICE

I am an associate at White & Case. On December 3, 1997, I caused to be served by hand same day delivery true copies of ASCAP' Reply to Broadcast Music, Inc.'s Response to ASCAP'S Motion to Strike Certain Portions of Their Direct Case on the following persons:

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Dated: New York, New York
December 3, 1997


Samuel Mosenkis